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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 915

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FEDERAL POWER COMMISSION,
*Petitioner,*

*v.*

METROPOLITAN EDISON COMPANY, NORTHERN PENNSYLVANIA POWER COMPANY, PENNSYLVANIA ELECTRIC COMPANY, ERIE LIGHTING COMPANY, THE CLARION RIVER POWER COMPANY and SOLAR ELECTRIC COMPANY,
*Respondents.*

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## RESPONDENTS' SUPPLEMENTAL BRIEF

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## RESPONDENTS' SUPPLEMENTAL BRIEF*

### Statement

It is not the purpose of this brief to consider isolated statements or arguments of the Commission, whose brief was received after respondents' main brief had been printed, but rather to discuss the basic questions which underlie the entire case, and which may aid this Court in reaching its decision.

* This brief is filed with leave of the Court.

It is fully shown in respondents' main brief (Point II, pp. 10-28) that the Commission's order of January 26, 1937, is *per se* a reviewable order within the purview of Section 313 of the Federal Power Act. That order having there been shown to be subject to the general appellate jurisdiction of the Circuit Court of Appeals, there will here be considered:

(I)—Whether the Circuit Court of Appeals had the power, under Section 262 of the Judicial Code, to issue a writ to protect prospective appellate jurisdiction, where no appeal had actually been taken;

(II)—Whether in this case there was in fact prospective appellate jurisdiction,—including a consideration of the exact function of the "application for rehearing" provided for in Section 313 of the Federal Power Act.

(III)—The reasons why prospective appellate jurisdiction was being destroyed; *as proved by the Commission's own statements;* and

(IV)—Whether the judgment of the court below is vague, or indefinite, or not in accordance with the usages and principles of law.

## I

## THE CIRCUIT COURT OF APPEALS HAD THE POWER, UNDER SECTION 262 OF THE JUDICIAL CODE, TO ISSUE ITS PROCESS TO PROTECT PROSPECTIVE APPELLATE JURISDICTION, ALTHOUGH NO APPEAL WAS ACTUALLY BEFORE IT.

Section 262 of the Judicial Code,* the so-called "All Writs" section, has been expressly held by this Court to grant to the Circuit Courts of Appeals full power to issue all writs in the nature of mandamus, injunction, etc., which may be necessary or advisable for the protection of their jurisdiction, in all cases within the general appellate jurisdiction of those courts. Certain earlier cases considered that the issuance of a writ to protect appellate jurisdiction was authorized only where an appeal had actually been perfected, but was unauthorized to protect a prospective appellate jurisdiction. There were likewise cases holding the contrary view. The conflict was definitely set at rest by this Court in its decision in *McClellan* v. *Carland,* 217 U. S. 268 (1910).

In that case the petitioners had applied to the Circuit Court of Appeals for the Eighth Circuit for a writ of mandamus against the judge for the Federal Circuit Court for North Dakota, to require him to set aside certain orders staying proceedings in a pending action. The judge had stayed proceedings in his court because another action was then pending in the state courts involving the same

* "Power to Issue Writs. * * * The Supreme Court, the Circuit Courts of Appeals, and the District Courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

subject matter. No appeal had, of course, as yet been taken to the Circuit Court of Appeals, nor could any have been taken at the time. That Court declined to issue its writ, sustaining the contention that it was without power to do so because its appellate jurisdiction had not yet attached. This Court *reversed* the Circuit Court of Appeals, holding (p. 279):

> "Section 12 of the Court of Appeals Act declares that the Circuit Court of Appeals shall have the powers specified in §716 of the Revised Statutes of the United States. That section we have already had occasion to quote, and when read in connection with §12 of the Court of Appeals Act it gives to the Circuit Court of Appeals the authority, as this Court has, to issue writs of *scire facias,* and all writs not specifically provided for by statute, and necessary for the exercise of the court's jurisdiction, and agreeable to the usages and principles of law.
>
> "In this case it appears that the original action commenced in the Circuit Court of the United States **might** have been taken on appeal to the Circuit Court of Appeals. • • • There are not wanting decisions in the Federal Courts holding different views as to the right to issue such writs as are involved in this case, before the appellate court has actually obtained jurisdiction of the case. There are expressions in opinions of this court to the effect that such writs issue in aid of a jurisdiction actually acquired. **But we think it is the true rule that where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below.** • • •
>
> • • •

"Inasmuch as the order of the Circuit Court staying the proceeding until after final judgment in the state court might prevent the adjudication of the questions involved, and thereby prevent a review thereof in the Circuit Court of Appeals, which had jurisdiction for that purpose, we think that court had power to issue the writ of mandamus to require the Circuit Court to proceed with and determine the action pending before it."*

It is therefore clear that in the case at bar, as in the *McClellan* case, the fact that respondents had not perfected an appeal to the Circuit Court of Appeals and, as will hereinafter be shown, were not and are not yet in a position to do so, did not deprive that Court of authority to issue its injunctive decree in the exercise of the powers conferred upon it by the "All-Writs" section of the Judicial Code.

## II

## THERE WAS IN FACT PROSPECTIVE APPELLATE JURISDICTION IN THE COURT BELOW.

### The Basic Difference Between the Parties in this Case

Every point of difference in this case between the Commission and the respondents, with the exception of the single question as to reviewability *per se* of the Commission's order of January 26, 1937, may be resolved ultimately to a disagreement as to the nature and function of a Petition for Rehearing under Section 313 of the Federal Power Act.**

---

* Emphasis and parenthetical matter within quotations throughout, ours.

** Section 313 of the Federal Power Act is printed in full text as an appendix to respondents' main brief.

We submit that the Commission has misconceived the true nature and function of a Petition for Rehearing; and that under the clearly correct concept of its nature and function there can be no question but that: (a) the Circuit Court of Appeals had prospective appellate jurisdiction, (b) the conduct of the Commission was destructive of it, and (c) the decree of the Court below was entirely proper in substance and in form, not vague, and may be complied with easily and with certainty.

## The Function of the "Petition for Rehearing"

Congress has set forth in Section 313 of the Federal Power Act the procedure for obtaining judicial review of a Commission order. The procedural design thus made effective upon the enactment of Parts II and III of the Federal Power Act in 1935, constitutes an effort by the Congress to deal with the question of court review of Commission orders in a comprehensive and rational manner that will at once protect the Commission against frivolous appeals, and at the same time afford aggrieved parties full opportunity for judicial review.

Under Section 313 of the Act, a party deeming itself aggrieved by a Commission order may file a written petition in the appropriate Circuit Court of Appeals praying for a modification or a vacation of that order. Such petition must, however, be filed "within sixty days after the order of the Commission upon the application for a rehearing",* and in turn a Petition for Rehearing must have been filed within thirty days after the issuance of the order complained of.**

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* §313 (b).

** §313 (a).

The Petition for Rehearing **must** set forth specifically the grounds upon which the application is based, and the objections made by the aggrieved party. The Commission, on such application, may grant the rehearing or deny it, or may abrogate or modify the order objected to without further hearing. The order to which objection is made is **not** vacated or stayed by the application for rehearing, nor by the granting thereof, for it is provided by Section 313(c), that: "The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order."

The Act specifically provides that:

> "No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon."*

and further, that:

> "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do."**

It is thus clear that a Petition for Rehearing filed to a Commission order is *an absolute prerequisite* to a court review of that order. This function is important and significant. It was obviously the design of the Congress that the Petition for Rehearing shall apprise the Commission that a party considers himself aggrieved by an

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* §313 (a)

** §313 (b).

order made by it; that if continued in effect by the Commission in its original substance he proposes to obtain a court review thereof; and that he has certain objections to the order which he specifies in his petition. The Commission, if it believes the objections well taken, may make suitable correction of its order; and if it does not, an appeal may be perfected. The Petition for Rehearing protects the Commission from surprise, and from not having *itself* had *first* the opportunity to consider the objections, pass upon them, and meet them if it believes them well taken. Thus, unnecessary appeals are avoided, both so far as the Commission and the parties before it are concerned.

These considerations of the nature of the appellate process under Section 313 of the Federal Power Act and the function thereunder of a Petition for Rehearing, make it immediately apparent that where a rehearing is granted, as was done in the case at bar, **its sole purpose is to enable the Commission to consider and to pass upon the *petitioner's* objections to the questioned order** before any objections not sustained are reviewed by the appellate court. If the order is vacated upon the filing of the Petition for Rehearing, or if it is vacated after hearings are held on the objections made therein, the aggrieved party is no longer aggrieved and needs no appeal. But if the Commission affirms, or merely modifies, the order against which the Petition for Rehearing was directed, then the aggrieved party is in a position to take his appeal.

It is the order of the Commission **after** the conclusion of the proceedings under the Petition for Rehearing, that is the order referred to in the Act when it states, in Section 313(b), that "after the order of the Commission upon

the application for rehearing'' an appeal may be taken. It is **this** order, determining the objections raised **by the aggrieved party** in its Petition for Rehearing and affirming, or modifying, the order objected to, that permits the party to institute an appeal from the order objected to, as so affirmed or modified. The *''order* of the Commission upon the application for rehearing'' contemplated by the Act, is the **order yet to be made** in this case, determining the objections raised in the Petition for Rehearing, and in accordance with such determination, affirming, modifying or vacating the order of January, 1937.*

It was manifestly **not** intended by the Congress that a judicial review of the objections should be had until the Commission had opportunity first to make and complete an administrative review. Indeed, to contend for any contrary construction does violence not only to the plain intent of the statute, but to the well established rule of law that a judicial remedy is not open where administrative remedies have not been exhausted.

*There is no dispute in this case as to this salient fact: The Commission has never passed upon the objections raised in respondents' Petition for Rehearing with respect to the order of January 26, 1937.* Concededly, a rehearing was granted. But, concededly, the minute of the Commission granting the rehearing did not purport to de-

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* The Commission itself, in its Supplemental Brief below (at p. 36), admitted that—

> "If the order of January 26, 1937, is a reviewable order, Section 313 of **the Federal Power Act requires that before the appellate jurisdiction of this Court (C.C.A.) may attach to review such order,** the aggrieved party must file an application for rehearing with the Commission and **no appeal will lie from such order (of January, 1937) until the Commission by subsequent order affirms, modifies, or abrogates the challenged order."**

cide the objections raised in the Petition for Rehearing, nor was it intended thereby to grant the prayers of that petition, nor did it do so.* **The rehearing was granted for the express purpose of considering and determining respondents' objections.** Thus, it is plain that **until the Commission has made an order determining those objections, respondents will not be in a position to perfect an appeal** to the Circuit Court of Appeals should the Commission's determination make that necessary.

While there was, therefore, no actual appeal before the Court below,—nor could there be, as the Court properly recognized,—there did exist prospective appellate jurisdiction which the Court had the power to protect, when protection was necessary.

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* At R. 49 the following excerpt from the minutes of the Commission appears:

> "The Commission, having considered the matters involved in the inquiry and investigation instituted against Metropolitan Edison Company, et al, Docket IT-5015, and the petition for rehearing filed therein by the respondents, Metropolitan Edison Company, Northern Pennsylvania Power Company, Pennsylvania Electric Company, Erie Lighting Company, The Clarion River Power Company, and Solar Electric Company, under date of February 23, 1937, grants said petition for rehearing and assigns the matters involved in this proceeding for hearing in the hearing rooms of the Commission in Washington, D. C. on the 14th day of April, 1937, at 10 a. m.
>
> "The Secretary is directed to give notice to petitioners that the petition for rehearing has been granted and advise all parties in interest of the time and place of hearing."

This minute of the Commission is obviously not *an order,* and is obviously not "the order of the Commission upon the application for rehearing" contemplated by Section 313(b) of the Federal Power Act as the completion of the administrative process, within the sixty days after which an appeal to the Circuit Court of Appeals may be taken.

## III

## THE FACTS REQUIRED ACTION BY THE COURT BELOW TO PROTECT ITS PROSPECTIVE APPELLATE JURISDICTION — AND THE COMMISSION'S OWN STATEMENTS PROVE IT.

If respondents objected merely to the rulings of an administrative officer on the relevancy of evidence, they would have no standing in this Court. Their case, however, is far more than that. It rests on the objection to the completion of the investigation called for by the Commission's order of January, 1937, under the guise of considering objections to its authority in law to make that order. **The *proof* of this fundamental assertion is of the utmost importance to respondents,** because if it is untrue, or if its truth is misapprehended or overlooked by the Court, respondents may be deprived of the relief properly granted by the Court below. Fortunately, the Commission itself, in its brief below, has supplied unquestionable proof.

The subject matter of the investigation under the questioned order of the Commission is, briefly stated, the propriety of service contracts and working arrangements between respondents and third persons claimed to be "affiliated" with them. Respondents' objections raised by their Petition for Rehearing questioned the Commission's authority in law to conduct an investigation of this subject matter. It is plain that *if the Commission has no authority to investigate the propriety of contracts with "affiliates,"* **the determination of "affiliation" is a matter of utter indifference.** It should likewise be plain that, *after adjourning without day* proceedings under its questioned order, and as an incident to a rehearing granted to

determine the challenge of its authority, the Commission may not attempt to determine who may be "affiliated" with respondents, and in doing so inquire into contracts and working arrangements and their propriety, *i. e.,* **the very subject matter of the investigation itself.** But this is exactly what the Commission has undertaken to do. It has done so by injecting in the rehearing an **additional** "jurisdictional" question not raised by respondents, but of the Commission's own making.

The great vice of the Commission's position is that pursuit of its **additional** "jurisdictional" question is, *on its own interpretation,* exactly coextensive with pursuit of the investigation under the questioned order of January, 1937.

In the Commission's brief below,* signed by its General Counsel, its then Solicitor, and one of its attorneys, the inquiry to be made under its questioned order of January, 1937, is defined thus unequivocally (at page 4):

> "* * * The questions assigned for hearing related solely to the jurisdiction of the Commission and its authority, upon proper order, to examine the books, accounts, memoranda, and records of alleged non-affiliates within the limits specified by Section 301(c) of the Federal Power Act. The specific questions were:
>
> "a. Identification of charges emanating from alleged non-affiliates reflected on the books of petitioners and relating to the business of petitioners.
>
> "b. Determination of the control of petitioners.
>
> "c. Determination of the control of alleged non-affiliates.

* For the Court's information, a copy of this brief will be filed by respondents with the Clerk of this Court.

**"No other questions were assigned for hearing, or were intended to be assigned for hearing by the order of January 26, 1937."**

At pages 25 and 26 of the Commission's same brief, it is stated:

> "The evidence introduced at the hearing which began on April 14, 1937, [upon the Petition for Rehearing] pertained exclusively to (a) the matters set forth in petitioners' plea to the jurisdiction of the Commission, **and** (b) the right and authority of the Commission to require by order the production of the books, records, memoranda, and accounts of the alleged non-affiliates for examination by representatives of the Commission. The petitioners introduced evidence relating to the jurisdictional questions raised by their so-called petition for rehearing. Thereafter counsel for the Commission began the introduction of evidence pertaining to the same jurisdictional questions **and also** jurisdictional facts upon which depended the right and authority of the Commission to require by order the production of the books, records, memoranda, and accounts of the alleged non-affiliates. **The specific jurisdictional questions were:**
>
> 1. Jurisdiction of the Commission over the person of petitioners.
>
> 2. Jurisdiction of the Commission over the subject matter of the inquiry and investigation instituted by order of the Commission under date of January 6, 1936.
>
> 3. **Jurisdiction of the Commission over alleged non-affiliates under Section 301(c) of the Federal Power Act, which necessitated—**
>
> (a) **Identification of charges emanating from alleged non-affiliates as reflected on the books of**

**petitioners and relating to the business of petitioners.**

(b) **Determination of the control of petitioners.**

(c) **Determination of the control of alleged non-affiliates.''**

Questions 1 and 2 were the objections raised by respondents in their Petition for Rehearing. Question 3 is the **additional** question fabricated by the Commission itself. When the Commission's own statement of the ''scope of the jurisdictional'' question of its own creation is contrasted* with its own statement of the investigation under the questioned order of January, 1937, there can be no possible doubt that **the Commission admittedly was proceeding under the guise of the rehearing** (the only proper function of which was to consider the objections raised by respondents' Petition for Rehearing), **with the investigation under the very order to which those objections were directed.**

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*COMMISSION'S STATEMENT OF ITS **Investigation** UNDER THE ORDER OF JANUARY 26, 1937 (Commission's Brief Below, p. 4)

''* * * The questions assigned for hearing related solely to the jurisdiction of the Commission and its authority, under proper order, to examine the books, accounts, memoranda, and records of alleged non-affiliates within the limits specified by Section 301(c) of the Federal Power Act. The specific questions were:

COMMISSION'S STATEMENT OF THE **Additional** JURISDICTIONAL QUESTION INJECTED BY IT ON THE REHEARING (Commission's Brief Below, p. 26)

''* * * Jurisdiction of the Commission over alleged non-affiliates under Section 301(c) of the Federal Power Act which necessitated:

(Footnote continued on following page)

To have completed the inquiry under the questioned order of January, 1937, would have rendered moot any determination by the Commission itself of its authority to investigate. It would likewise have rendered moot and destroyed the prospective appellate jurisdiction of the Circuit Court of Appeals to review the Commission's determination as to its powers. Obviously, once the investigation was completed, it could not be undone, regardless of any subsequent determination that the Commission had acted without authority.

Thus it plainly appears that the subject of the proceedings instituted in the court below was by no means a mere question of the relevancy of evidence admitted by a trial examiner in an administrative proceeding. It was objection to a course of conduct which was a frustration of respondents' administrative remedy under the Act, through a perversion of the functions of a Petition for Rehearing thereunder, which at the same time destroyed

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"(a) Identification of charges emanating from alleged non-affiliates reflected on the books of petitioners and relating to the business of petitioners.

"(b) Determination of the control of petitioners.

"(c) Determination of the control of alleged non-affiliates."

"No other questions were assigned for hearing, or were intended to be assigned for hearing by the order of January 26, 1937."

"(a) Identification of charges emanating from alleged non-affiliates as reflected on the books of petitioners and relating to the business of petitioners.

"(b) Determination of the control of petitioners.

"(c) Determination of the control of alleged non-affiliates."

On the Commission's own statement, the investigation contemplated under its questioned order of January 26, 1937, and the inquiry contemplated by its fabricated **additional** jurisdictional question injected in the rehearing, **are one and the same thing.**

the Circuit Court's prospective appellate jurisdiction. For, surely, it is a perversion of a statutory provision granting and controlling judicial review of Commission orders to employ the Petition for Rehearing prerequisite thereto as a device to nullify the very court review it is its function to facilitate, and to carry out the order as to which rehearing was granted to consider respondents' objections, *in defiance of those very objections.* **It was the Commission's *studied course of conduct*, constituting this perversion, and *not* incidental rulings of the trial examiner, with which the Court below was concerned, and it was that perversion, and nothing more, which the decree of the Circuit Court of Appeals was designed to stop.**

It is urged by the Commission that the Circuit Court's decree can not be sustained because it is contrary to "the usages and principles of law". If it is contrary to the usages and principles of law to put at an end a sham proceeding which made a mockery of the Act of Congress in pursuance of which it was purported to be undertaken, then "the usages and principles of law" are meaningless and empty phrases with no practical application to a state of facts which cries out for judicial intervention.

## IV

## THE DECREE OF THE COURT BELOW WAS ENTIRELY PROPER IN SUBSTANCE AND IN FORM. IT IS NOT VAGUE, BUT MAY BE COMPLIED WITH EASILY AND WITH CERTAINTY.

The decree of the court below is asserted by the Commission in its brief and argument to be fatally defective because of vagueness and indefiniteness. It is

neither vague nor indefinite. Both the Court's judgment (R. 62) and the simple guides stated in its opinion (R. 50) could easily be followed by the Commission, if it were willing to do so. Only because of the Commission's disingenuous assertion that it may inject into the rehearing, for consideration thereon, objections to its own order of its **own** fabrication, does there arise the slightest difficulty of compliance with the mandate of the Circuit Court of Appeals.

The judgment of the court below restrained the Commission:

> "* * * **from proceeding with its proposed inquiry and investigation** in accordance with its two orders of January 6, 1936, and January 26, 1937, **until the questions raised in the petition for rehearing are determined by it.**" (R. 62)

In its opinion the Court stated:

> "Coming to the merits of the case, when the petition [for rehearing] was filed and granted **it was the plain duty of the Federal Commission to determine the issues raised in the petition. We are going to remand the case for such determination. In doing so the evidence admitted should be strictly confined to the two issues raised in the petition and not extended to the scope of the investigation proposed** in the orders of January 6, 1936 and January 26, 1937. The relation of the evidence to the two questions involved should be apparent and logical and not far fetched and remotely inferential. Some of the evidence admitted when the case was before the Federal Commission on rehearing was not relevant and material. If both sides will seek to produce only such evidence as is clearly admissible, we venture to hope that the

> determination of the issues will be speedy, final, and satisfactory.
>
> **Remanding the case, we express no opinion on the merits of the questions to be decided.** The determination of them is for the Federal Commission under relevant and competent evidence. The Act has provided a review by this Court of the orders of the Federal Commission and no order on the merits is now before us. **These proceedings were taken so that the questions would not be moot if and when they come here.**'' (R. 53)

The Commission knows, or should know, what are the **only** two issues raised in the Petition for Rehearing as to which evidence may be required. The Commission has only to limit its evidence to those two issues, and not attempt to extend it into the so-called **additional** question fabricated by the Commission, *i. e.*, the investigation under the questioned order itself, and there will be presented none of the difficulties such as those referred to at page 22 of the Commission's brief in this Court, concerning evidence of ''affiliation'' between respondents and third persons: for questions of ''affiliation'' cannot possibly arise in considering the objections to the questioned order raised by respondents.

So that this may be entirely clear to this Court, we shall point out specifically the objections raised in the Petition for Rehearing. Their mere statement discloses how sharply defined are the issues presented before the Commission, how apt was the direction of the court below, and how readily it may be complied with.

## The Two Issues on Rehearing Which Require Evidence for Their Determination

(1) Three of the respondents raised objections that the Commission was without jurisdiction of their persons in the premises.* These objections were based on the claim that the respondents raising them are not "public utilities" as defined in the Act. A "public utility" is so defined as a "person who owns or operates facilities subject to the jurisdiction of the Commission under this Part".** The provisions of the Part referred to (Part II), apply only to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, and confer on the Commission jurisdiction only over the facilities for such transmission or sale of electric energy. Concededly, factual evidence is necessary to resolve the objections. Such evidence in support of their objections was offered by respondents. The Commission and its engineering and legal staff know very well the kind of evidence required on this issue, and compliance with the decree below in this regard presents no problem whatever.

(2) The second objection requiring evidence for its proof, raised by respondents in their Petition for Rehearing, was that the true purpose of the investigation was to supply information to the Pennsylvania Commission for use in penalty proceedings under state law, and that such purpose was improper.*** The respondents offered

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* Petition for Rehearing, Paragraph Eighth (R. 15).

** Federal Power Act, §201(e).

*** Petition for Rehearing, Paragraphs Ninth and Twenty-fourth (R. 16 and 20).

testimony to establish the existence of that purpose. The Commission has since conceded it, so that that issue of fact is no longer in the case. There remains, therefore, only the pure question of law as to whether the Commission's motives are material in determining its statutory authority to investigate.

## The Remaining Issues on Rehearing—None of Which Require Evidence for Their Determination

The Petition for Rehearing [Paragraph Twentieth (R. 19)] alleges:

> "The Commission has not been vested by the Federal Power Act, or otherwise, with jurisdiction or power to determine the propriety of contracts or working arrangements between public utilities and others, or the reasonableness of charges thereunder. * * *"

*Whether or not this is true is a pure question of law requiring no evidence for its determination.*

The Petition for Rehearing [Paragraph Twenty-first (R. 19)] alleges:

> "The Federal Power Act contains no provision requiring that services rendered to public utilities be rendered at cost, and confers no duty, power, or jurisdiction on the Commission to determine whether charges paid by public utilities for services rendered to them exceed the cost thereof. * * *"

*Whether or not this is true is likewise a pure question of law requiring no evidence for its determination.*

The Petition for Rehearing [Paragraph Twenty-first (R. 19)] alleges:

> "* * * The Commission is so proceeding despite the fact that the Federal Power Act contains no provisions whatever prescribing any standards of propriety for such contracts, working arrangements, and practices. The Commission is so proceeding despite the fact that there are no rules or regulations whatever issued by the Commission pursuant to the authority of the Federal Power Act, or otherwise, containing any provisions prescribing standards of propriety for such contracts, working arrangements, practices, and charges."

*Whether or not this is true is likewise a pure question of law requiring no evidence for its determination.*

The Petition for Rehearing [Paragraph Twenty-third (R. 20)] alleges:

> "* * * The Commission is so proceeding, despite the fact that the Commission has no jurisdiction or power to adopt rules or to issue orders relating to such contracts, working arrangements, practices, or charges, in the absence of express statutory provision relating thereto in the Federal Power Act, or otherwise, and despite the fact that neither the Federal Power Act nor any other statute contains any such provisions."

*Whether or not this is true is likewise a pure question of law requiring no evidence for its determination.*

These four jurisdictional objections cover completely the subject matter of the Commission's inquiry and investigation. In addition to those objections, it was asserted in the Petition for Rehearing that forced compliance with the order of January, 1937 would violate the respondents'

rights under Article 1, Section VIII, and amendments IV, V and X of the Constitution of the United States.* There can be no question that these objections are purely questions of Constitutional Law which do not require for their decision any factual testimony.

**It thus appears that the objections raised in the Petition for Rehearing do not require, except in a single instance, any factual testimony whatever either in support of them, or to rebut them, or to decide them.** To resolve these objections it is necessary only to look to the face of the order objected to, and to the plain terms of the Federal Power Act, and the Constitution. And, in the single instance where jurisdiction or the lack of it depends on factual evidence, the character of such evidence is well known to the Commission, and could not, by the wildest stretch of the imagination, be constituted of matters such as are discussed in the second section of the Commission's brief in this Court.**

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* Petition for Rehearing, Paragraphs Twenty-fifth, Twenty-seventh, Twenty-eighth and Thirtieth (R. 21 and 22).

** On this analysis of the objections raised by the Petition for Rehearing, the Court may readily see that evidence, *e. g.,* as to statements, vouchers and bills covering various charges or payments (Stenographer's Minutes of Proceedings before the Commission, pp. 497-8, 505-7), as to expenses in opposing the Wheeler-Rayburn Bill (S.M. pp. 387-88), as to charges for stationery and supplies (S.M. pp. 439-441), as to whether or not a foreign corporation was properly domesticated in Pennsylvania (S.M. pp. 308-9), as to contents of minute books of foreign corporations (S.M. p. 305), as to what may or may not constitute sound accounting practice (S.M. pp. 464-6, 473-4), and as to the business relations of persons other than respondents with companies not even claimed to be in any way related to respondents (S.M. pp. 419-20), while relevant to the furtherance of the investigation under the questioned order, had no relation to the determination of respondents' objections, raised in the Petition for Rehearing, that the Commission was without legal authority to carry on the investigation—objections which it was the Commission's plain duty to determine before it rendered them moot by the assumption and exercise of the questioned powers.

Properly viewed, therefore, the decree of the court below is anything but vague and indefinite. Under that decree, the Commission may at once proceed with the determination of the objections raised in the Petition for Rehearing, and above stated. A cooperative compliance with the Circuit Court's suggestion could well bring to fruition the hope expressed by that Court, "that the determination of the issues will be speedy, final and satisfactory".

## Conclusion

We again urge upon the Court that unless the relief accorded by the Circuit Court of Appeals is sustained, there can not be in this case, *and, what is far more important to the citizenry at large,* **there can not be in any other case,** any relief against the prosecution by an administrative body of an unauthorized investigation. The Commission's brief in this Court makes this clear. At page 9 it is stated:

> "So far as appears, the investigation will not even culminate in an appealable order."

Again at pages 17 and 18 thereof it is repeated:

> "The order was entered in an investigation which for aught that appears would not even culminate in an appealable order."

Under this Court's decision in *Meyers* v. *Bethlehem Shipbuilding Corporation* (No. 181, October Term, 1937) the District Courts are powerless to afford injunctive relief against administrative investigations. If, as the Commission contends, an administrative investigation may be completed without culmination in an order that is appeal-

able to the Circuit Court of Appeals in accordance with the Act, then this Commission, or any other administrative body, may proceed with investigations utterly beyond their powers, and do so **with complete freedom from any judicial restraint by this or any other Court in the land.**

To urge that the authority to investigate may be tested on refusal to comply with a subpoena, is indeed no answer: for the Court must surely appreciate that an investigation by an administrative body, equally as well as an investigation conducted by such an inquisitorial body as a Grand Jury, may be fully completed without calling the person under investigation to appear and to testify. In the case of a Grand Jury investigation, the proceedings are clothed in secrecy. The investigatory proceedings of administrative bodies, on the contrary, are notoriously garbed in publicity. The conclusions of a Grand Jury contained in its presentment are generally followed by a judicial proceeding, in which the validity of the charges are tested with all due safeguards of constitutional rights. But under the Commission's view of the law there can be no test, judicial or otherwise, of the validity of the conclusions of an investigatory administrative agency, no matter how far it exceeds its authority in investigating. Yet the same conduct by a court of law has long since been recognized as an unconstitutional denial of due process of law. *Pennoyer* v. *Neff*, 95 U. S. 714; *Scott* v. *McNeal*, 154 U. S. 34; *Twining* v. *New Jersey*, 211 U. S. 78.

The admonitions of this Court in the *Jones* case* against the appropriation of unauthorized power by admin-

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* *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1, 24, 27.

istrative agencies, its recent admonition that administrative agencies should "accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play"*—these admonitions, and many others like them, and the basic principles of our government which underlie them—all must be discarded and forgotten if the Commission's contentions in this case are to prevail. The implications from such an unprecedented departure from our firmly established institutions would be so far reaching that only the clearest mandate of the people, speaking through the Congress, can require such a result.

There is no such mandate. There is no such requirement.

**THE JUDGMENT OF THE COURT BELOW SHOULD BE AFFIRMED.**

Respectfully submitted,

WALTER BIDDLE SAUL,
*Counsel for Respondents.*

C. EDWARD PAXSON,
EDWARD F. HUBER,
GEO. J. BANIGAN,
*of Counsel.*

May 6, 1938.

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* *Morgan* v. *United States*—No. 581, October Term, 1937, Decided April 25, 1938.

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# SUPREME COURT OF THE UNITED STATES.

No. 915.—October Term, 1937.

Federal Power Commission, Petitioner,
*vs.*
Metropolitan Edison Company, Northern Pennsylvania Power Company, Pennsylvania Electric Company, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[May 23, 1938.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

On January 6, 1936, the Federal Power Commission instituted an investigation to determine the "conditions, practices, and matters regarding the ownership, operation, management, and control" of the respondent corporations. The order directed respondents to file with the Commission copies of contracts and statements of working arrangements between respondents and persons controlling them, and statements of charges on respondents' books for 1934 and 1935 representing payments made and obligations incurred to such persons. Respondents were also directed to make their books, records, etc., available for examination by the Commission's representatives. The investigation was instituted on representations of the Governor and Public Service Commission of Pennsylvania.

Respondents challenged the jurisdiction of the Commission to make the order, and, reserving their right to question its legality, they furnished various data and information. Following an examination of the books and records of respondents, the Commission's examiners submitted a report on December 10, 1936.

Thereupon the Commission, on January 26, 1937, made an order providing that a hearing should be held on March 3, 1937. The order recited that the respondents had reported charges appearing upon their books which represented payments made and obligations incurred to named persons as (a) "conceded affiliates" and (b) "not conceded affiliates", respectively; that the exam-

ination of the books and records of respondents and of admitted affiliates disclosed transactions between respondents and additional named persons, and that the accounting representatives of the Commission had submitted a report indicating that certain named persons "control respondents, or are controlled by the same persons which control respondents". The order then directed respondents to appear at the hearing, as stated, and to present information bearing upon the question of control and specifically showing (1) their form of organization, respectively, (2) their articles of incorporation, partnership agreements or other documents of organization, (3) the names and addresses of partners, directors, officers, trustees and agents, (4) the ownership held by such persons "in or over any other person named above", as well as the manner by which such ownership was maintained, and (5) such other data as might from time to time be required by the Commission. The order further directed that a copy of the report prepared by the accounting representatives of the Commission should be served on each person named, and the Commission gave notice that the hearing would be had by the Commission sitting jointly with the Public Service Commission of Pennsylvania. See Federal Power Act, Sec. 209(b), 49 Stat. 853.

Respondents then filed with the Commission a petition for rehearing as to the order of January 26, 1937, asking for the vacating of that order and the termination of the proceeding initiated by the order of January 6, 1936. Respondents contended that the Commission lacked jurisdiction to conduct an investigation concerning the propriety of contracts and working arrangements between respondents and third persons, and, in particular, (1) that the Commission was without power to investigate for the purpose of supplying information to a state commission for use in local proceedings for violations of local law, and, (2) that as to three of the respondents the Commission was without jurisdiction of their persons because they were not "public utilities" as defined in the Federal Power Act.

The Commission thereupon adjourned without day the hearing directed by the order of January 26, 1937. Later, the Commission granted the petition for rehearing and assigned "the matters involved" for hearing on April 14, 1937. Respondents then appeared and introduced evidence tending to support their objections to the

Commission's jurisdiction. The Commission's counsel then introduced evidence on its behalf. Respondents objected to its admissibility upon the ground that it was immaterial to the issues presented by the petition for rehearing. Their objection was overruled and respondents then asked the examiner to certify to the Commission the request to define the issues to be determined on the petition for rehearing and to instruct its representatives that no evidence in furtherance of the orders of January 6, 1936, and January 26, 1937, be introduced. The examiner refused and respondents then presented a like request to the Commission, which was denied on April 20, 1937, for the reason that its rules of practice did not provide for that method "of *interim* review of the examiner's rulings". Upon remand to the examiner, he again ruled against respondents, stating that their rights could "be amply protected by the usual method of exceptions" and argument thereon.

Respondents then presented, on April 21, 1937, to the Circuit Court of Appeals a petition asking for a rule to show cause why the Commission should not be restrained from taking any steps in furtherance of the inquiry under the orders of January 6, 1936, or of January 26, 1937, until the petition for rehearing had been disposed of, and from introducing any evidence except that which was relevant to the questions raised by the petition for rehearing. The Circuit Court of Appeals, on July 6, 1937, issued the rule to show cause, as prayed, returnable on October 4, 1937, and on September 7, 1937, granted a temporary stay. The Commission made its return to the rule and asked for a dismissal of the petition. The Circuit Court of Appeals rendered its decision on January 27, 1938. Its decree remanded the case to the Commission "for determination in accordance with the opinion" of the court and restrained the Commission "from proceeding with its proposed inquiry and investigation in accordance with its two orders of January 6, 1936, and January 26, 1937, until the questions raised in the petition for rehearing are determined by it".

In its opinion the court stated that the only issues of fact raised by the petition for rehearing and the evidence of the respondents were that three of the respondents were not "public utilities" as defined by the Federal Power Act and that the purpose of the investigation was to supply information to the Pennsylvania Com-

mission for use in local proceedings designed to impose penalties under the state law. 94 F. (2d) 943, 945. The court said (*id.*, p. 946):

"Coming to the merits of the case, when the petition was filed and granted it was the plain duty of the Federal Commission to determine the issues raised in the petition. We are going to remand the case for such determination. In doing so the evidence admitted should be strictly confined to the two issues raised in the petition and not extended to the scope of the investigation proposed in the orders of January 6, 1936, and January 26, 1937. The relation of the evidence to the two questions involved should be apparent and logical and not far-fetched and remotely inferential. Some of the evidence admitted when the case was before the Federal Commission on rehearing was not relevant and material. If both sides will seek to produce only such evidence as is clearly admissible, we venture to hope that the determination of the issues will be speedy, final and satisfactory.

"In remanding the case we express no opinion on the merits of the questions to be decided. The determination of them is for the Federal Commission under relevant and competent evidence. The Act has provided a review by this Court of the orders of the Federal Commission and no order on the merits is now before us. These proceedings were taken so that the questions would not be moot if and when they come here".

This Court granted certiorari and the cause has been argued. We are of the opinion that the Circuit Court of Appeals had no jurisdiction to enter the decree.

*First.*—There was no order of the Commission before the Circuit Court of Appeals for review. Apart from the question whether the order of January 6, 1936, or that of January 26, 1937, can be regarded as reviewable, no application for such a review had been made.

The provision conferring appellate jurisdiction on the Circuit Court of Appeals in relation to orders of the Federal Power Commission is found in Section 313 of the Federal Power Act, as amended by the Act of August 26, 1935, c. 687, 49 Stat. 860, 861.[1]

[1] "Sec. 313. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may

Section 313(a) provides that any person aggrieved by an order of the Commission may apply for a rehearing within thirty days after its issuance and that no proceeding to review any order of the Commission shall be brought unless there has been an application for a rehearing thereon.

Respondents say that under this provision they could not ask review of the order of January 26, 1937, until they had sought a rehearing. They did seek a rehearing and it was granted. No appeal from the order granting it would lie and none was attempted. Respondents do not contend that there was any appeal from an order, or any application for a review of an order, pending before the Circuit Court of Appeals. On the contrary, respondents say that the Commission "has never passed upon the objections raised in respondents' petition for rehearing with respect to the order of January 26, 1937"; that "concededly, the minute of

be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

"(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., Title 28, Secs. 346 and 347)".

the Commission granting a rehearing did not purport to decide the objections raised in the petition for rehearing"; and that "until the Commission has made an order determining those objections, respondents will not be in a position to perfect an appeal to the Circuit Court of Appeals should the Commission's determination make that necessary".

*Second.*—Respondents seek to sustain the action of the Circuit Court of Appeals by virtue of the authority conferred by Section 262 of the Judicial Code which provides that the federal courts shall have power "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law". The argument is that the Circuit Court of Appeals could intervene to protect its prospective appellate jurisdiction. We are of the opinion that this contention is unsound and that the Circuit Court of Appeals in the circumstances disclosed had no appellate jurisdiction to protect.

The argument proceeds on the view that the order of January 26, 1937, despite its preliminary character, was a reviewable order subject only to the requirement that an application for rehearing should first be made. Reliance is placed on Section 313(b) of the Federal Power Act that "Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals". But neither this language, nor that of Section 313(a), should be construed as authorizing a review of every order that the Commission may make, albeit of a merely procedural character. Such a construction, affording opportunity for constant delays in the course of the administrative proceeding for the purpose of reviewing mere procedural requirements or interlocutory directions, would do violence to the manifest purpose of the provision.

The context in Section 313(b) indicates the nature of the orders which are subject to review. Upon service of the petition for review, the Commission is to certify and file with the appellate court "a transcript of the record upon which the order complained of was entered". The statute contemplates a case in which the Commission has taken evidence and made findings. Its findings, if supported by evidence, are to be conclusive. The appellate court may order additional evidence to be taken by the Commission and

the Commission may thereupon make modified or new findings. The provision for review thus relates to orders of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case.

There are persuasive analogies in the construction of provisions for the review of the orders of other administrative bodies. The Urgent Deficiencies Act of October 22, 1913,[2] provides for cases brought to enjoin, set aside, or suspend "*any order*" of the Interstate Commerce Commission. But this Court has held that "there are many orders of the Commission which are not judicially reviewable under this provision". See *United States* v. *Los Angeles & Salt Lake R. R. Co.*, 273 U. S. 299, 309, and cases cited. In *United States* v. *Illinois Central R. R. Co.*, 244 U. S. 82, the Interstate Commerce Commission had made an order for a hearing upon an issue of reparation. The Railroad Company contended that the Commission had no jurisdiction to award damages in the case presented. A decree of the District Court, enjoining the Commission from proceeding with the hearing was reversed by this Court with directions to dismiss the petition. The "order" was not of the sort which brought it within the purview of the statute. It was a mere step in procedure. See, also, *New York, Ontario & Western Rwy. Co.* v. *United States*, 14 F. (2d) 850, affirmed 273 U. S. 652. Negative orders of the Commission are not reviewable. *Procter & Gamble Co.* v. *United States*, 225 U. S. 282; *Lehigh Valley R. R. Co.* v. *United States*, 243 U. S. 412, 414. A final report by the Commission on value under Section 19a of the Interstate Commerce Act, though called an order, is not reviewable. *United States* v. *Los Angeles & Salt Lake R. R. Co.*, *supra*. Compare *United States* v. *Atlanta, Birmingham & Coast R. R. Co.*, 282 U. S. 522, 527; *Great Northern Railway* v. *United States*, 277 U. S. 172, 181, 182; *United States* v. *Griffin*, decided February 28, 1938; *Shannahan* v. *United States*, decided April 4, 1938. With respect to other regulatory bodies, it has been held that mere preliminary or procedural orders are not within the statutes providing for review by the Circuit Court of Appeals. *Chamber of Commerce* v. *Federal Trade Commission*, 280 Fed. 45, 48; *Ames Baldwin Wyoming Co.*

[2] 28 U. S. C. 47.

v. *National Labor Relations Board*, 73 F. (2d) 489, 490; *Jones* v. *Securities and Exchange Commission*, 79 F. (2d) 617, 619; 298 U. S. 1, 14. So, attempts to enjoin administrative hearings because of a supposed or threatened injury, and thus obtain judicial relief before the prescribed administrative remedy has been exhausted, have been held to be at war with the long-settled rule of judicial administration. *Myers* v. *Bethlehem Shipbuilding Corporation*, decided January 31, 1938. See, also, *Securities and Exchange Commission* v. *Andrews*, 88 F. (2d) 441.

The Commission's order of January 26, 1937, (a) fixed a date for hearing, (b) required respondents to appear, and (c) required them to produce the information and documents described. In fixing a date for hearing, the order was nothing more than a notice. *United States* v. *Illinois Central R. R. Co.*, *supra*, p. 89. The statute confers no authority upon the Commission to enforce its directions to appear, testify or produce books and papers save by application to a federal court under Section 307(c)[3] Upon such an application, the court may require attendance, testimony and the production of books and papers touching the matter under investigation and failure to obey such an order of the court may be punished by it as a contempt. We think that this provision embraces all cases of alleged "contumacy" on the part of any person who is required to attend, give testimony, or produce documents. Upon such an application by the Commission for the enforcement of its order, respondents would have full opportunity

[3] Subdivision (c) of Section 307 of the Federal Power Act is as follows:

"(c) In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, contracts, agreements, and other records. Such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found or may be doing business. Any person who willfully shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in his or its power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both".

o contest its validity. See *Jones* v. *Securities and Exchange Commission, supra.* In the instant case no such application by the Commission has been made. Section 307(c) also provides that ny person who willfully fails or refuses to attend and testify, or roduce books and papers, in obedience to the subpoena of the Commission, shall be guilty of a misdemeanor and be subject to fine and mprisonment. The qualification that the refusal must be "willful" fully protects one whose refusal is made in good faith and pon grounds which entitle him to the judgment of the court before bedience is compelled.

The Commission's order of January 26, 1937, lay outside any ppellate jurisdiction conferred by the statute upon the Circuit Court of Appeals. In that view, Section 262 of the Judicial Code ives no support to the decree under review and its injunction and nstructions to the Commission must be regarded as unauthorized.

The decree of the Circuit Court of Appeals is reversed and the ause is remanded with directions to dismiss the respondents' etition.

*It is so ordered.*

Mr. Justice ROBERTS and Mr. Justice CARDOZO took no part in he consideration and decision of this case.

A true copy.

Test:

*Clerk, Supreme Court, U. S.*